32551 SERVICE DATE - LATE RELEASE FEBRUARY 20, 2002
CO

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33877

ILLINOIS CENTRAL RAILROAD COMPANY–CONSTRUCTION AND OPERATION EXEMPTION–IN EAST BATON ROUGE PARISH, LA

Decided: February 19, 2002

This decision denies a petition by The Kansas City Southern Railway Company (KCS) to stay, pending judicial review, the effectiveness of an exemption granted to Illinois Central Railroad Company (IC) to construct and operate a line of railroad. This exemption is scheduled to become effective on February 22, 2002.

BACKGROUND

On November 29, 2000, IC filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct and operate a line of railroad approximately 3.2 miles in length, in a primarily industrial area of East Baton Rouge Parish, LA. The line is intended to connect IC's Maryland Industrial Lead with the Baton Rouge Polyolefins (BRPO) plant of ExxonMobil Chemical Company. Currently, the ExxonMobil facility is served directly only by KCS, though IC has commercial access to the plant via reciprocal switching.

The Board's environmental rules implementing the National Environmental Policy Act, 49 U.S.C. 4321 et seq. (NEPA), provide that, while a full Environmental Impact Statement (EIS) would normally be prepared for rail construction proposals, 49 CFR 1105.6(a), a more limited Environmental Assessment (EA) is sufficient where a railroad demonstrates that the particular proposal is not likely to have a significant environmental impact.[1] 49 CFR 1105.6(d). The EA is based on the information supplied by the railroad and upon independent investigation and verification by the Section of Environmental Analysis (SEA). The EA is made available for public comment. The Board then considers the EA, the public comments, and any post-EA recommendations of SEA before rendering its final decision in the proceeding. 49 CFR 1105.10(b), (f).

[1] In recent years, an EA has been prepared in most rail construction cases. Over the last 10 years, approximately 30 rail construction proposals have been granted; a full EIS was prepared in 4 of these cases.

In accordance with agency practice, in conjunction with its petition for exemption, IC submitted a written request for a waiver of the EIS. On December 7, 2000, SEA granted the waiver based on all of the information then available.[2] SEA noted in its waiver letter that, should the environmental review process disclose unanticipated significant impacts, preparation of an EIS might be warranted. SEA made the waiver letter available to KCS at KCS's request, and KCS filed a letter with SEA on December 22, 2000, opposing the waiver of the EIS.

In February 2001, KCS served extensive discovery requests on IC relating primarily to environmental issues. IC opposed the discovery request. In a decision served May 25, 2001, the Board's Secretary denied a motion by KCS to compel discovery responses and for a declaration of admissions. The Secretary noted that, in rail construction cases, environmental issues should be raised during the environmental review process. KCS filed an appeal of the Secretary's denial and IC replied. On August 21, 2001, the Board issued a decision denying KCS's appeal. The Board found (at p. 3) that, unlike substantive transportation issues, where litigants use discovery to develop an adequate evidentiary record and the Board renders decision based on the parties' representations, SEA conducts an independent environmental review of construction proposals. The Board stated (id.) that, in accordance with NEPA, SEA includes extensive public outreach to ensure public awareness of the construction proposals before the agency and of the opportunity to participate in the Board's process. Also, SEA issues every EA or EIS in draft form first for public review and comment. SEA then prepares a final environmental document responding to the comments and setting forth SEA's ultimate recommendations to the Board for its consideration. Thus, the Board noted (id.) that KCS, like any other interested party, would have the opportunity to raise its environmental concerns about this case before and during the comment period, and that there was no reason to believe that, without discovery by KCS, SEA would not have sufficient information to be able to adequately assess the environmental impacts of IC's proposal.

By decision served on October 25, 2001,[3] the Board conditionally exempted IC under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901. In the decision, the Board stated that, upon completion of the environmental review process, it would issue a final decision addressing the environmental impacts and, if appropriate, make the exemption effective at that time.

---

[2] SEA noted that this is a short 3.2-mile construction in a primarily industrial area that is not environmentally sensitive, that rail traffic will be low (one round trip movement per day), that the predominant commodities that would be handled over the line (high-density polyethylene plastic and polypropylene plastic shipped in pellet form in covered hopper cars) are not considered hazardous, that the project should have little or no impact on residential areas, and that no threatened endangered fish or wildlife or species of special concern have been found.

[3] Notice was published in the Federal Register on October 25, 2001 (66 FR 54059).

A detailed EA was prepared by SEA and issued for public review and comment on July 20, 2001. In preparing the EA, SEA consulted with appropriate Federal, state and local agencies and IC, conducted site visits, and conducted technical analyses. SEA's evaluation assessed potential impacts to soils, geology, and climate, surface and groundwater, air quality, biological resources, noise, cultural resources, hazardous materials and waste sites, traffic safety, and socioeconomic and environmental justice concerns. In the EA, SEA preliminarily concluded that, based on the information provided from all of these sources, the construction and operation of IC's rail line would not significantly affect the quality of the human environment, if the mitigation measures set forth in Section 5.0 of the EA were imposed. A copy of IC's request for waiver of the EIS requirement and the letter granting it were included in the EA. Comments to the EA were due on August 20, 2001.

Several comments to the EA were submitted.[4] In its comments on the EA, KCS criticized the EA for failing to address what it claimed were IC's plans to construct storage-in-transit facilities. To support its claim that a storage facility was planned, KCS provided a verified statement from KCS's own vice president speculating that "ExxonMobil may have plans to build a new storage facility on the Maryland Tank Farm property similar to a facility that KCS had previously proposed to have built for Exxon's storage needs." V.S. Cleator at 2. KCS also submitted a verified statement from another KCS official stating that KCS had suggested to ExxonMobil ways to resolve the shipper's alleged car storage problems, but "[had] met a cold reception," and that KCS's suggestions were "turned down." V.S. Davies at 4-5. Nonetheless, KCS claimed (with no further specifics provided) that "ExxonMobil now plans to build a rail storage yard on the tank farm property." Id. at 5.

After considering the comments, in November 2001, SEA issued a post environmental assessment (Post EA). In addressing KCS's comments, SEA noted that IC had informed SEA that there is sufficient capacity within the existing IC rail system in the Baton Rouge area (where IC has the largest rail operation) to serve the BRPO plant and that no new in-transit storage facilities would be needed. Thus, SEA concluded, based on its independent analysis (Post EA at 5-4) that IC's rail line proposal does not include the construction of any new in transit storage facilities. SEA again determined that the construction and operation of IC's line would not result in any significant environmental impacts if the mitigation measures recommended in the EA, and set forth in final form in the Post EA, were imposed and implemented. SEA further determined that no new analysis or changes to the conclusions in the EA were required, and that there was no need to prepare a full EIS.

[4] Commenters included the United States Department of the Interior, Fish and Wildlife Service; Louisiana Governor M.J. "Mike" Foster, Jr.; The Louisiana Department of Environmental Quality; KCS; Ms. Florence T. Robinson; Ms. Gwendolyn Robinson; Mrs. Augustine C. Warner; and Mr. David E. Grimes.

By a decision served on January 23, 2002, the Board concurred in SEA's determination, authorized the construction, adopted the environmental mitigation measures recommended by SEA, and imposed them as a condition to the exemption authority granted to IC for this construction.[5]

KCS filed a petition on February 1, 2002, asking the Board to stay the effectiveness of the exemption, pending judicial review. IC replied on February 11, 2002.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for stay. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). As discussed below, KCS has not made the showing required under these standards.

KCS Is Unlikely to Prevail on the Merits.

KCS contends that the Board did not give the IC proposal the "hard look" required by NEPA, the Council on Environmental Quality (CEQ) regulations at 40 CFR 1500, et seq., and the Board's environmental rules at 49 CFR 1105, et seq. However, it fails to present any evidence to show that IC's proposal will result in potentially significant environmental impacts. The EA provides a thorough and searching analysis of all of the relevant issues and IC has not demonstrated that a full EIS is required here or that the environmental conditions imposed by the Board are inadequate to mitigate the environmental effects discovered during the course of the environmental review. KCS presents two arguments supporting its contention that it will prevail on the merits of a judicial challenge, one a perceived notice problem and one an allegation that the scope of the EA was too narrow. Neither argument, however, demonstrates that KCS will likely prevail on the merits.

---

[5] In addition, the Board was advised by the Louisiana Department of Transportation and Development (DOTD) and IC, in letters dated January 9 and 17, 2002, that IC and DOTD had reached an agreement regarding operation of the proposed at-grade crossing where IC's rail line would cross U.S. Highway 61 in East Baton Rouge Parish. By letter dated January 22, 2002, IC advised the Board that it did not object to its making the terms of the agreement a condition to the issuance of the exemption authority to construct the line. Accordingly, the Board included an additional mitigation measure (Number 10), reflecting the agreement between IC and DOTD.

KCS first argues that it was not afforded proper notice in the EA process. In particular, KCS complains that it was not served a copy of the IC letter requesting waiver of the EIS or the letter granting it, and that it learned of the decision to waive the EIS requirement only by inquiry.[6] The courts have, however, upheld the sufficiency of the practice of the Board's predecessor, the Interstate Commerce Commission, and now the practice of the Board, of including in the EA SEA's waiver letters containing its determination that an EA will suffice and that an EIS is not required. See Missouri Mining v. ICC, 33 F.3d 980, 983-84 (8th Cir. 1994). Doing so ensures that all interested parties are afforded the opportunity to learn about the basis on which the waiver was granted and to argue, during the public comment period on the EA, that an EIS is necessary. Id.

Here, the record shows that KCS was given ample opportunity to raise its environmental concerns, including those related to notice and to waiver of the EIS. The EA included SEA's waiver of the EIS requirement.[7] When the EA was released, comments were solicited on all aspects of the EA, and all interested parties were given an opportunity to respond. Following the comment period, SEA made available to the Board and placed in the public docket its Post EA addressing the parties' concerns, including those raised by KCS.[8] The Board then considered the entire environmental record (including the EA, Post EA and comments on the EA) and agreed that the EA was adequate and that there was no need to prepare an EIS here. Thus, the Board's environmental review process complied with NEPA. See City of Auburn v. STB, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (specifically finding that the same NEPA procedures that were followed here gave the public "ample opportunity to raise environmental concerns").

It is disingenuous of KCS to claim lack of notice in this proceeding. That carrier has been an active participant at every phase of this case.[9] In fact, KCS learned of the waiver, and

---

[6] KCS itself, however, concedes that it received both the waiver request and SEA's letter granting the waiver in December 2000. The waiver letters also were attached to the EA.

[7] The EA also contained IC's and SEA's waiver correspondence. These materials and KCS's waiver correspondence were placed in the Board's public docket. The Post EA was also available in that docket.

[8] The Board also addressed KCS's concerns in two discovery decisions.

[9] The environmental review process is informal and thus allows public participation both prior to and following the issuance of the EA. For example, KCS filed letters in this proceeding on December 20, 2000, January 15, 2001, and February 16, 2001, raising various concerns about the environmental review process. Each of these letters was considered and answered. Also, KCS participated in the public comment period following issuance of the EA, and its comments (continued...)

was furnished copies of the documents it requested, long before the public comment period on the EA began. Further, KCS had ample opportunity during the comment period to argue that an EIS was necessary and that the EA was inadequate, which it did. KCS's arguments were fully considered and rejected in the Post EA,[10] and the Board adopted SEA's analysis in its January 2002 decision.

KCS also argues that, by failing to consider in the EA (or, as KCS urges, an EIS) the environmental impacts of the construction of storage infrastructure, the environmental review in this case was inadequate. KCS states in its petition that it believes additional storage facilities will be needed when IC completes its construction, and that such construction will result in substantial and significant unspecified damage to the environment. Failure to address the environmental impacts of such storage facility construction, KCS argues, constitutes a failure under NEPA and the CEQ regulations.

KCS's argument lacks merit. The EA thoroughly analyzed all direct, indirect, and cumulative environmental impacts that are reasonably foreseeable actions of the IC proposal, as required by the CEQ regulations implementing NEPA and the Board's environmental rules.[11] See 40 CFR 1508.7 and 1508.8. Contrary to KCS's claims, however, the record here does not show that a storage facility is reasonably foreseeable. Therefore, there was no need for the Board to assess the environmental impacts of constructing and maintaining a storage facility.

IC did not propose a storage facility as part of its construction proposal and has stated repeatedly on the record that it does not intend or need to construct a storage facility.[12] See IC's reply at 2-4 and the citations listed there. KCS argues that another entity, such as ExxonMobil, may construct such a facility and argues that the construction of such a facility by an entity not subject to the Board's jurisdiction requires environmental analysis because, but for the authority given to IC, it would not be built. But KCS's claim is speculative and unsupported. The claim

---

[9](...continued)
were addressed in the Post EA.

[10] Contrary to KCS's suggestion, the Post EA is placed in the public docket and is readily available at any time.

[11] SEA's environmental review process included site inspections, consultations with Federal, state, and local agencies and members of the public, independent research and analysis to identify environmental impact areas and issues, the acceptance and analysis of comments, and the recommendation of numerous mitigation measures subsequently imposed by the Board.

[12] IC states that it already has the ability to store cars in the Baton Rouge area and elsewhere via remote storage, and states that ExxonMobil is satisfied with IC's existing storage capabilities.

that a storage facility will be built is not accompanied by any independent evidence, such as statements by ExxonMobil, land use permit applications for such a project, surveys showing the prospect of future construction, photographs of construction activities, or allocation of funds for that purpose. In short, no storage facility is reasonably foreseeable here. Therefore, the Board reasonably found no need to assess the potential environmental effects of any such facility in this case.[13]

KCS has not demonstrated any new evidence or a change in circumstances since this argument was considered and rejected in the Post EA[14] to lead to the conclusion that KCS will prevail on the merits of a judicial challenge to the adequacy of the EA. Rather, as the record here shows, a reviewing court likely will find that the scope of the EA was adequate, that the public (including KCS) had ample opportunity to raise environmental concerns, that the Board fully satisfied its responsibilities under NEPA, and that the Board properly concluded, following a thorough environmental analysis, that, as mitigated, IC's proposal is environmentally sound.

KCS Will Not Suffer Irreparable Harm.

KCS has not shown that it would be irreparably harmed in the absence of a stay. As KCS correctly notes in its petition, "the party seeking injunctive relief must show that the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, construction is not imminent. IC must first obtain authority from the Board to cross the tracks of KCS, and IC's petition for crossing authority is currently pending at the Board. See Illinois Central Railroad Company – Petition for Crossing Authority – In East Baton Rouge Parish, LA, STB Finance Docket No. 33877 (Sub-No. 1) (STB served Oct. 25, 2001). IC cannot build the line and initiate operations unless and until the Board grants IC the authority it seeks to cross the tracks of KCS.[15]

But if crossing activity is issued prior to the conclusion of judicial review, KCS has not shown irreparable harm if construction proceeds pending judicial review. For the reasons

---

[13] Even if the shippers were to construct such a facility at some point in the future, KCS has not identified what the anticipated environmental effects of building a storage facility may be.

[14] See Post EA at 5-4.

[15] Even were the Board to grant authority to cross, the issue of compensation would still have to be resolved, by agreement of the parties or by Board order, before operations could commence.

discussed above, KCS has failed to show that the Board's decision to allow the construction and operation of the line at issue is environmentally infirm.[16]

KCS does not support its claim that, absent a stay, the construction of a storage facility resulting from IC's proposed construction will have significant environmental impacts that were not considered in the EA. As discussed above, the record contains no support for KCS's assertion that a storage facility will be built during the foreseeable future. A party seeking injunctive relief must substantiate its claim that irreparable injury is likely to occur. See Washington Metro. Area Transit Comm'n, 559 F.2d at 843 n.3. Here, KCS has not shown that construction of a storage facility is likely. Thus, KCS has failed to demonstrate that it will suffer irreparable injury in the absence of a stay.

Issuance of a Stay Would Harm IC and ExxonMobil.

As previously noted, the Board may act on the crossing petition in the ordinary course of business before the Court acts on the petition for review filed by KCS. If the Board grants the crossing petition (and sets the compensation which IC is to pay to KCS), a stay would preclude IC from building the line pending judicial review. That delay would harm both IC and ExxonMobil, which would not receive the benefit of the increased competition that this new line is designed to introduce.[17]

Issuance of a Stay Would Contravene the Public Interest.

Because the public would benefit from obtaining products transported in more competitively priced rail service, a stay postponing the realization of that benefit would also injure the public.

In sum, KCS has not demonstrated that it is likely to prevail on judicial review. Nor has it shown that it will suffer irreparable injury in the absence of a stay. To the contrary, the record

---

[16] As KCS currently serves the ExxonMobil facility, the construction of the IC line would make KCS into a soon-to-be competitor of IC for the business generated by the plant. But the fact that KCS may suffer economically from such competition does not constitute irreparable harm.

[17] Currently, IC has access to the ExxonMobil plant through a reciprocal switching arrangement with KCS — service in which KCS, for a fee, transports the cars of other carriers over its lines to destination, thereby permitting those other carriers to establish single-line rates for this customer. However, IC and ExxonMobil have evidently made only very limited use of this existing option, because of the assertedly high fee KCS charges for the reciprocal switching arrangement.

shows that IC and ExxonMobil in particular and the public in general would be harmed by the grant of a stay. Thus, the petition for stay will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. KCS's petition for stay is denied.

2. This decision is effective on the date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary